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Supreme Court, U.S.
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No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF *AMICI CURIAE* OF THE STATES OF WEST VIRGINIA, CALIFORNIA, DELAWARE, GUAM, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, AND VERMONT IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Federal Employers Liability Act ("FELA") requires that damages for indivisible harms such as personal injuries be "apportioned" among all potentially responsible tortfeasors.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	5
ARGUMENT	6
A. UNDER TRADITIONAL COMMON LAW PRINCIPLES, DEFENDANTS WERE JOINTLY LIABLE FOR THE ENTIRE INJURY THEY CAUSED	6
B. UNITARY PERSONAL INJURIES HAVE NOT BEEN CONSIDERED "DIVISIBLE" UNDER THE COMMON LAW	14
C. MODERN DEVELOPMENTS PROVIDE NO BASIS FOR INCORPORATING A RULE OF PROPORTIONATE SEVERAL LIABILITY IN FELA	18
CONCLUSION	28

TABLE OF AUTHORITIES

Cases:	Page
Alaska v. Philip Morris, No. 1JU-97-915CI (1st Jud. Dist. Oct. 9, 1998)	2
Allen v. Chance Mfg. Co., 873 F.2d 465 (1st Cir. 1989)	18-19
Arizona v. American Tobacco Co., No. CV-SC-14769 (Ariz. Sup. Ct. 1997)	2
Arnold v. Milling Co., 119 P. 373 (Kan. 1911)	13
Azure v. Billings, 596 P.2d 460 (Mont. 1979)	17
Bard v. Yohn, 26 Pa. 482 (1856)	11-13
Barlye v. Martin, 82 Eng. Rep. 498 (1647)	8
Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997)	18-19, 25, 26
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Borel v. Fibreboard Paper Prods., 493 F.2d 1073 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974)	16
Boston & Albany R. Co. v. Shanly, 107 Mass. 568 (1871)	11
Bastard v. Hancock, 90 Eng. Rep. 810 (1695)	8-9
Brown v. Neison, 82 Eng. Rep. 741 (1650)	8-9
Brown v. Wooton, 79 Eng. Rep. 62, 63 (1600)	8
Buchanan v. Collier, 555 So. 2d 134 (Ala. 1989)	18
Buckley v. *Metro-North Commuter R.R.*, 521 U.S. 424 (1997)	5
Buehler v. Whalen, 374 N.E.2d 460 (Ill. 1977)	16
Campbell v. City of Stillwater, 20 N.W. 320 (Minn. 1884)	11
Capone v. Donovan, 480 A.2d 1249 (Pa. Super. Ct. 1984)	16
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	Page
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Cushing v. High, 175 P. 229 (Okla. 1918)	13
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Dickenson v. Tabb, 156 S.E.2d 795 (Va. 1967)	18-19
Dixon v. Bell, 105 Eng. Rep. 1023 (1816)	8
Enriquez v. Cochran, 967 P.2d 1136 (N.M. Ct. App. 1997)	21
Erie Ry. v. Erie & W.T. Co., 204 U.S. 220 (1907)	10
Florida v. American Tobacco Co., CL 95-1466 AH, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996)	2
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	Page
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Idaho v. Philip Morris, No. CV-OC-97-03239 *D (Idaho Dist. Ct. 1998)	2
Illidge v. Goodwin, 172 Eng. Rep. 934 (1831)	8
Illinois v. Philip Morris, No. 96L 13146 (Ill. Cir. Ct. 1997)	2
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Kinley v. Hines, 137 A. 9 (Conn. 1927)	8
Lowfield v. Bankroft and Al, 93 Eng. Rep. 935 (1731)	8-9
Lynch v. Nurdin, 113 Eng. Rep. 1041 (1841)	8
Maddux v. Donaldson, 108 N.W.2d 33 (Mich. 1961)	17
Maryland v. Philip Morris, 1997 WL 540913 (Md. Cir. Ct. 1997)	2
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McDaniel v. Cherryvale, 136 P. 899 (Kan. 1913)	13
McDermott v. Hannibal & St. J. R. Co., 87 Mo. 285 (1885)	11-12
McDonald v. Robinson, 224 N.W. 820 (Iowa 1929)	8
Memphis Consol. Gas & Electric Co. v. Creighton, 183 F. 552 (6th Cir. 1910)	10
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	Page
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Newville v. State of Montana Dept. of Family Services, 883 P.2d 793 (Mont. 1994)	23-24
Ohio v. Philip Morris, No. 97CVH05-5114 (Ohio Ct. of Common Pleas 1998)	2-3
Onslow v. Orchard, 93 Eng. Rep. 610 (1721)	8-9
Oregon v. American Tobacco Co., No. 9706-04457 (Multnonah Co. Cir. Ct. 1997)	2-3
Peters v. Johnson, 264 P. 459 (Or. 1928)	8
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Plumb v. Fourth Judicial District Ct., 927 P.2d 1011 (Mont. 1996)	24
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	Page
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Sir John Heydon's Case, 77 Eng. Rep. 1150 (1612)	8
Slater v. Mersereau, 64 N.Y. 138 (1876)	11-12
Smith v. Rines et al., 22 F. Cas. 639 (C. Mass. 1836)	9
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Smithson v. Garth and Others, 83 Eng. Rep. 711 (1691)	8-9
Sophie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989)	21
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	Page
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Page

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Alaska Stat. § 46.03.822	21
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Cal. Civ. Code 1431.2	21
Conn. Gen Stat. § 52-572h(g)	19
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Nev. Rev. Stat. § 41.141(5)(c)	21
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Pa. Code § 7102	18-19
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Page

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Page

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INTEREST OF *AMICI CURIAE*

Amici curiae, the undersigned Attorneys General of the States of West Virginia, California, Delaware, Guam, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, and Vermont submit this brief in support of respondents Freeman Ayers, *et al.* soley on the question of whether damages should be "apportioned" among responsible tortfeasors under the FELA.[1] *Amici* have a strong interest in this case for two reasons.

First, *amici* have a strong, principled interest in safeguarding the ability of injured plaintiffs to recover damages from responsible tortfeasors. This is a long-standing and important right under applicable law. The civil justice system promotes substantial state interests in public health, safety, and welfare. It also ensures that injured victims receive compensation from responsible tortfeasors rather than burdening public assistance programs and the treasuries of the States.

One of the most venerable and important components of state civil justice systems is the rule of joint and several liability. Although joint and several liability is often regarded as a modern innovation, the doctrine actually is one of the foundation stones of the civil justice system. The first recorded case invoking the doctrine was published in 1302, and the doctrine was well cemented in the common law of torts on both sides of the Atlantic in the centuries preceding the American Revolution. This traditional, well-established tort principle lies primarily within the state domain rather than the federal realm. State courts have been principally responsible for expounding, interpreting, and applying joint and several liability and other rules of tort law. Although legislatures in certain states have chosen to modify the rule of joint and several liability, these legislative efforts

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1. This brief does not address the first question certified by the court of whether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer without proof of physical manifestations of the claimed emotional distress.

reflect important policy choices on the part of the States. States, through their courts or legislatures, should remain free to make different judgments and adopt different approaches as they see fit.

Hence, even States that have modified joint and several liability by statute have an important interest in this case. Through long processes of common-law evolution and legislative enactment, the States have developed and refined their tort systems to balance the needs and rights of victims against the interests of defendants. *Amici* urge this Court not to upset this balance by disturbing longstanding principles of tort law, including joint and several liability. These principles should be left to the States.

Second, *amici* have a compelling self-interest in preserving traditional rules of tort law, including joint and several liability, because the States frequently sue as plaintiffs to vindicate their own interests and to protect the interests of their employees, residents, and citizens. In recent years, many state and local governments have acted as plaintiffs by filing actions against tobacco companies,[2] pharmaceutical

2. *See, e.g.*, *Alaska v. Philip Morris*, No. 1JU-97-915CI (1st Jud. Dist. Oct. 9, 1998); *Arizona v. American Tobacco Co.*, No. CV-SC-14769 (Ariz. Sup. Ct. May 27, 1997); *Colorado v. R.J. Reynolds Tobacco Co.*, 1997 CV-003432 (Colo. Dist. Ct. Oct. 2, 1998); *Florida v. American Tobacco Co.*, CL 95-1466 AH, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996); *Hawaii v. Brown & Williamson Tobacco Co.*, No. 97-0441-01 (Haw. Cir. Ct. Sept. 18, 1998); *Idaho v. Philip Morris*, No. CV-OC-97-03239 *D (Idaho Dist. Ct. Sept. 2, 1998); *Illinois v. Philip Morris*, No. 96L 13146 (Ill. Cir. Ct. Nov. 13, 1997); *Iowa v. R.J. Reynolds Tobacco Co.*, No. CL 71048 (Iowa Dist. Ct. Aug. 26, 1997), *Maryland v. Philip Morris*, 1997 WL 540913 (Md. Cir. Ct. 1997); *Massachusetts v. Philip Morris*, No. 95-7378-J (Mass. Super. Ct. Oct. 22, 1997); *Michigan v. Philip Morris*, No. 96-84281-CZ (Mich. Cir. Ct. May 28, 1997); *Minnesota v. Philip Morris*, 551 N.W.2d 490 (Minn. 1996); *Mississippi v. American Tobacco Co.*, No. 94-1429 (Miss. Chan. Ct. Feb. 21, 1995); *Montana v. Philip Morris*, No. CDV-97-306 (Mont. Dist. Ct. Sept. 23, 1998); *Nevada v. Philip Morris*, No. CV97-03279 (Nev.

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manufacturers,[3] software makers,[4] lead paint manufacturers,[5] and other defendants.

Today, many States are taking an active role in proceedings involving WorldCom, Inc.,[6] Arthur Anderson

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Dist. Ct. May 8, 1998); *New Jersey v. R.J. Reynolds Tobacco Co.*, No. C-254-96 (N.J. Super. Ct. Sept. 18, 1998); *Ohio v.* Philip Morris, No. 97CVH05-5114 (Ohio Ct. of Common Pleas Aug. 28, 1998); *Oregon v. American Tobacco Co.*, No. 9706-04457 (Multnomah Co. Cir. Ct. June 1997); *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997); *Vermont v. Philip Morris*, No. S 744-97 CnC (Vt. Super. Ct. Mar. 25, 1998); *Washington v. American Tobacco Co.*, No. 96-2-15-56-8 SEA, 1996 WL 931316 (Wash. Super. Ct. 1996); *West Virginia v. American Tobacco Co.*, No. 94-C1707 (W. Va. Cir. Ct. May 3, 1995); *and Wisconsin v. Philip Morris*, No. 97-CV-328 (Wis. Cir. Ct. Mar. 17, 1998). *See also Rosello v. Brown & Williamson Tobacco Corp.*, No. 97-1910 (JAF) (D.P.R. Aug. 10, 1998).

3. *See, e.g.*, *State of Connecticut v. Mylan Laboratories, Inc.*, M.D.L. No. 1290, Misc. No. 990276 (D.D.C. 19__) (action by the Attorneys General of the fifty States and the District of Columbia against five defendants); *State of Ohio v. Bristol-Myers Squibb* (D.D.C. filed June 4, 2002) (suit for alleged excessive pricing of breast cancer drug Taxol by twenty-nine States and District of Columbia).

4. *See, e.g.*, *New York v. Microsoft Corp.*, Civil Action No. 98-1233 (D.D.C. 1998).

5. *See, e.g.*, *Sheldon Whitehouse, Att'y Gen. of the State of Rhode Island v. Lead Industries Ass'n*, No. 99-5226, 2001 WL 345830 (R.I. Super. Apr. 2, 2001) (rejecting motion to dismiss and holding that state attorney general has standing to sue on counts of public nuisance, civil conspiracy, unjust enrichment, indemnity, and violation of state unfair trade practice and consumer protection act, regarding claims based on strict liability and negligence that alleged harm resulting from lead in public buildings). *See also City of New York v. Lead Industries Ass'n, Inc.*, 275 A.D.2d 669, 713 N.Y.S.2d 345 (N.Y.A.D. 1 Dept. 2000).

6. *See, e.g.*,*West Virginia Investment Management Board v. WorldCom, Inc, et al.*, C.A. No. 02-C-1877, (Cir. Ct. of Kanawha Co., filed July 17, 2002).

LLP,[7] Global Crossing, Ltd.,[8] Enron Corp. and other companies whose potential securities violations have resulted in enormous losses to state employee pension funds. Tellingly, the States often invoke joint and several liability principles to sue the accounting firms, affiliates, subsidiaries, officers, directors, or investment banks of these companies. For example, West Virginia invoked those principles in its recently filed lawsuit against WorldCom, Inc. That suit also names, as defendants, WorldCom's former CEO, Bernard J. Ebbers, WorldCom accounting firm, Arthur Andersen LLP, and WorldCom's investment banks, including Cititgroup, Inc, Salomon Smith Barney, Inc., J.P. Morgan Securities, Inc., and Banc of America Securities LLC.[9]

Indeed, the Attorneys General of 26 States — Arkansas, California, Connecticut, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Washington, West Virginia, and Wisconsin — recently filed a brief *amici curiae* in the University of California's federal securities fraud suit against Enron Corp., urging the presiding judge to deny the motions to dismiss submitted by Enron's investment banks, law firms, and accounting firms. Significantly, the Attorneys General contend that Enron's accounting firms, law firms, and investment banks can be found "primar[ily] liable" — *i.e.*, jointly, not proportionately liable — for the company's alleged fraud, even though aiding-and-abetting liability does not exist under federal securities law.[10]

7. *See, e.g., State of Connecticut v. Arthur Andersen LLP, et al.*, CV-02-0816222-S (Conn. Super. Ct., Hartford, filed Apr. 16, 2002).

8. *See, e.g., Roffe v. Global Crossing, Ltd.*, C.A. No. 02-CV-1039 RSWL(Ctx) (C.D. Cal., W. Div., filed Feb. 14, 2002).

9. *West Virginia Investment Management Board v. WorldCom, Inc., et al., supra.*

10. *In re Enron Corp. Sec. Litig.*; No. 01-3624, *Amicus Curiae* Memorandum Relating to Motion to Dismiss, at 8 (S.D. Tex., filed June 10, 2002).

The Attorneys General accordingly assert that each of "the banks, law firms, and accountants are subject to liability for each other's conduct. . . ."[11]

Whenever States prosecute lawsuits as plaintiffs, they are entitled to rely on traditional rules of tort law, including the venerable doctrine of joint and several liability. Significantly, however, as the States note in their *Enron* brief, "state courts often look to federal case law for interpretative guidance in construing" comparable state law.[12]

That precept applies with particular force to decisions rendered by this Court. For that reason, any pronouncement by this Court that joint and several liability is an antiquated, disused, and disdained doctrine, a doctrine that is out of fashion and out of step with the common law — or any declaration that apportionment of damages is now part of the "national consensus" of common law courts — would not only be inaccurate but could have considerable repercussions in the State courts and wherever the States seek to vindicate their own interests or protect the rights of their employees, residents, and citizens.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner contends that in cases such as this one involving interpretation of the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51, *et seq.*, this Court's determination of liability rules is " 'informed by reference to the evolving common law.' "[13] Petitioner asserts: (a) that apportionment (essentially a rule of proportionate several liability) prevailed at common law prior to FELA's enactment; and (b) apportionment constitutes the common law in the majority of U.S. jurisdictions today. On the basis of these assertions, petitioner asks this Court to announce a common-law principle that damages must be

11. *Id.* at 16.

12. *Id.* at 2.

13. *Buckley v. Metro-North Commuter R.R.*, 521 U.S. 424, 439 (1997) (quoting *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432 (1958)).

apportioned among tortfeasors whenever such apportionment is reasonably possible.

This Court should reject this request because both assertions are incorrect. Indeed, petitioner's assertions are belied by the fact that to the extent that state law regarding apportionment has changed in recent decades, that law has been changed overwhelmingly by enactments of state legislatures, not by decisions of common law state courts.

In this light, petitioner is not merely asking the Court to re-state ostensibly well-settled common law principles (as they supposedly existed at the time of FELA's enactment and purportedly exist today) but to re-interpret and reform a body of tort law that is the traditional province of the States, not the federal government. This Court should tread carefully in such matters.

Amici submit that the prevailing rule at common law has long been and still remains the principle of joint and several liability, not proportionate several liability. Joint and several liability has been particularly important in cases involving personal injuries, deaths, and other indivisible harms.

In *amici's* view, state courts and state legislatures should be free to choose different approaches to joint and several liability. In fact, the majority of the States have chosen to retain joint and several liability, in whole or in part, and there are sound policy reasons for doing so. This Court would not be justified in declaring that there is a "national consensus" in favor of apportionment. Nor would this Court be justified in enshrining a uniform, national standard of proportionate several liability in the FELA.

ARGUMENT

A. Under Traditional Common Law Principles, Defendants Were Jointly Liable for the Entire Injury They Caused.

Petitioner argues that the common law required that damages be apportioned among all potentially contributing causes whenever such apportionment was possible. Petitioner argues that "[a]pportionment was the common law rule."

Petitioner's Br. 32. That is not an accurate statement of the law. Indeed, by acknowledging that States have departed from joint and several liability by *statute*, petitioner implicitly concedes that apportionment was not the common-law rule.

As explained by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"),

> [a]t early common law, there was no occasion to apportion tort responsibility, for at least two reasons. First, contributory negligence of the plaintiff was a complete bar and apportionment of responsibility between a plaintiff and a defendant was not part of the process. The plaintiff either recovered all of his or her damages or recovered nothing. Second, the rules of procedure would not permit joinder in most tort cases involving multiple tortfeasors unless the defendants had acted in concert. Each tortfeasor had to be sued separately.[14]

The absence of apportionment did not, however, prevent plaintiffs from recovering from defendants who had contributed to their injuries. As the leading treatise on torts explained, "[q]uite apart from any question of vicarious liability or joinder of defendants, the common law developed a separate principle, that a defendant might be liable for the entire loss sustained by the plaintiff, even though the defendant's act concurred or combined with that of another wrongdoer to produce the result."[15] Although each tortfeasor had to be sued separately, "each might be liable for the entire loss."[16] "If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such

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14. Prefatory Note, Uniform Apportionment of Tort Responsibility Act, at 1 (2002 draft).

15. W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, & David G. Owen, PROSSER & KEETON ON THE LAW OF TORTS § 47, at 328 (5th ed. 1984).

16. *Id.*

causes, innumerable, are always present."[17] "Thus, where two vehicles collide and injure a bystander, or a passenger in one of them, each driver may be liable for the harm inflicted."[18]

The common law enabled each tortfeasor to be held liable for the entire result of the joint tort. In *Barlye v. Martin*, for example, the mid-seventeenth century English court held that it was no defense that an action for trespass "ought to have been brought particularly, against the other trespassers together with the defendant, and not against the defendant in particular."[19] The court held that the plaintiff may proceed against the other tortfeasors "when he can, and that he may well proceed against them at divers times as he can take them."[20] The same principles guided English courts as far back as 1302,[21] and joint and several liability was frequently recognized by English courts throughout the seventeenth and eighteenth centuries and well into the nineteenth century.[22]

17. *Id.* at § 41, p. 268.

18. *Id.* (citing *Chiles v. Rohl*, 201 N.W. 154 (S.D. 1924); *Kinley v. Hines*, 137 A. 9 (Conn. 1927); *Peters v. Johnson*, 264 P. 459 (Or. 1928); *Glazener v. Safety Transit Lines*, 146 S.E. 134 (N.C. 1929); *McDonald v. Robinson*, 224 N.W. 820 (Iowa 1929)). *See also* William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 418 (1937).

19. 82 Eng. Rep. 498, 498 (1647).

20. *Id.*

21. *See De Bodreugam v. Arcedekne*, YB 30 Edw. I (Rolls Series) 106 (1302) (defendants jointly and severally liable for participating in a joint beating and kidnapping).

22. *See, e.g., Dixon v. Bell*, 105 Eng. Rep. 1023 (1816) (defendant gave loaded gun to young servant, who negligently shot plaintiff); *Illidge v. Goodwin*, 172 Eng. Rep. 934 (1831) (defendant left horse unguarded in street, passing stranger whipped it); *Lynch v. Nurdin*, 113 Eng. Rep. 1041 (1841) (defendant left horse and cart in street, and boy made them move). *See also Brown v. Wooton*, 79 Eng. Rep. 62, 63 (1600) (remedy against one is remedy against all); *Crane & Hill v. Hummerstone*, 79 Eng. Rep. 102 (1606) (joint judgments must be given against both defendants); *Sir John Heydon's Case*, 77 Eng. Rep. 1150, 1151 (1612)

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Antebellum American courts similarly followed the rule that tortfeasors who acted independently to create the plaintiff's injury were each liable for the entire harm. Justice Story explained that "actions, founded in tort, may be maintained against all, or any one or more of the tortfeasors; for every tort is joint, as well as several," and that "[t]here is no principle, upon which the defendant has a right, in any courts of justice, to say, that the action shall be several, and not joint; and thus to take away the right of election, which the plaintiff has by law, to make it joint."[23]

This Court followed these same principles in the decades preceding FELA's enactment. In *Washington & Georgetown R. Co. v. Hickey*,[24] for example, this Court rejected a streetcar

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(each participant in a joint beating held entirely liable, regardless of his particular role in the assault); *Brown v. Nelson*, 82 Eng. Rep. 741 (1650) (in action for joint trespass, satisfaction may be had against one party in the absence of others); *Radney v. Strode & Others*, 89 Eng. Rep. 1046 (1685) (plaintiff may choose against whom to take judgment); *Smithson v. Garth and Others*, 83 Eng. Rep. 711 (1691) (each defendant who participated in a joint tort beating — where one hit the plaintiff, a second held him, and a third stole his property — was entirely liable for all ensuing injuries, regardless of his particular role); *Bastard v. Hancock*, 90 Eng. Rep. 810 (1695) (one defendant may be liable for a joint action); *Onslow v. Orchard*, 93 Eng. Rep. 610 (1721) (damages must be joint, not several); *Lowfield v. Bankroft* and Al, 93 Eng. Rep. 935 (1731) (same); *Sabin v. Long*, 95 Eng. Rep. 475 (1743) (same); *Hill v. Goodchild*, 98 Eng. Rep. 465 (1771) (damages may not be severed).

23. *Smith v. Rines, et al.*, 22 F. Cas. 639, 643 (C. Mass. 1836) (2 Sumn. 338, No. 13,100) (Story, J.). *See also Wright v. Lathrop*, 2 Ohio 33, 53 (1825) ("That each joint trespasser is answerable for the acts of all, and that the plaintiff may pursue his remedy against one or all, is unquestioned."); *Williams v. Sheldon*, 10 Wend. 654, 656 (N.Y. 1833); *Hopkins v. Hersey*, 20 Me. 449, 452-453 (1841) (successive illegal sales of the same oxen; no joinder permitted, and each defendant may be held liable for the whole injury); *Webb v. Cecil*, 48 Ky. 198, 49 Am. Dec. 423 (1848) (slander of title by two defendants, and no joinder possible).

24. 166 U.S. 521 (1897).

company's defense to a personal injury claim for which it was jointly responsible. Similarly, in *Grand Trunk Ry. Co. v. Cummings*,[25] this Court held that a negligent railroad could be held liable for an employee's injury, even though the negligence of a fellow-servant of the employee also contributed to the injury.[26] Finally, as Justice Holmes explained on the eve of FELA's enactment, under admiralty law, where two vessels were both at fault, the cargo owners could recover their whole damages from either one.[27]

State supreme courts followed the same rule in the half-century prior to FELA's enactment. The Illinois Supreme Court, for example, adhered to

> the long and well-established principle that where one has received an actionable injury at the hands of two or more wrong-doers, all, however, numerous, are severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff in such case has the election to sue all jointly, or he may bring his separate action against each or any one of the wrong-doers.[28]

25. 106 U.S. 700, 702 (1882).

26. *See also Gila Valley, Globe & Northern Ry. Co. v. Lyon*, 203 U.S. 465, 473 (1906) ("if the negligence of the company had a share in causing the injury to the deceased, the company was liable, notwithstanding the negligence of a fellow servant contributed to the happening of the accident").

27. *Erie Ry. v. Erie & W.T. Co.*, 204 U.S. 220, 224 (1907). *See also Memphis Consol. Gas & Electric Co. v. Creighton*, 183 F. 552, 555 (6th Cir. 1910) ("[T]he causes of the injury were concurrent. The accumulation of the gas was one; the lighted match was the other. . . . In such case an inquiry about the proximate cause is not pertinent, for both are liable.").

28. *Wabash, S. L & P. Ry. Co. v. Shacklett*, 105 Ill. 364, 381 (1883); *see also Murdock v. Walker*, 43 Ill. App. 590, 592 (1892) (separate negligence of druggist did not limit doctor's malpractice liability: "the negligence of the druggist concurred with that of the appellant in producing the result, which is not a defense").

Similarly, the Massachusetts Supreme Judicial Court held multiple defendants jointly liable for entire harm even though

> [i]t is not alleged that these parties acted in concert in making the several articles, or placing their respective articles in the plaintiffs' care, nor even that they had knowledge of each other's proceedings. Each acted separately in sending goods, and omitting to give notice. But each party violated his duty none the less because he was ignorant as to what other articles were to be carried in the same car with his.[29]

The Minnesota Supreme Court explained that it had no choice but to adhere to "the rule that it is immaterial how many others may have been in fault, if the defendant's act or negligence was an efficient cause of the injury."[30] The New York Court of Appeals carefully articulated the logic of this principle.

> It is true the defendant and Moore & Bryant were not jointly interested in reference to the separate acts which produced the damages. Although they acted independently of each other, they did act at the same time in causing the damages, etc., each contributing towards it, and although the act of each, alone and of itself, might not have caused the entire injury, under the circumstances presented, there is no good reason why each should not be liable for the damages caused by the different acts of all.[31]

Again, while

> the contractor and subcontractors were separately negligent, and although such negligence was not concurrent, yet the negligence of both these parties contributed to produce the damages caused at one and the same time. It is no defence for a person against whom negligence which caused damage is

29. *Boston & Albany R. Co. v. Shanly*, 107 Mass. 568, 577 (1871).

30. *Campbell v. City of Stillwater*, 20 N.W. 320, 321 (Minn. 1884).

31. *Slater v. Mersereau*, 64 N.Y. 138, 146 (1876).

proved, to prove that without fault on his part the same damages would have resulted from the act of another.[32]

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32. *Id.* at. 147. *See also West Muncie Strawboard Co. v. Slack*, 72 N.E. 879, 880 (Ind. 1904)

> If a party deliberately places himself in opposition to the entire community by performing an act which, in combination with the independent wrongful acts of others, . . . creates a public nuisance, he is not in a position to assert that he should be held responsible to individuals specially damaged for only the actual loss he alone has occasioned them. He must have anticipated the natural and probable consequences of his acts, . . . and the public interest requires he shall, if need be, even in a civil action, bear the full burden of the wrong he has assisted in inflicting.

"[E]ach may be answerable in a joint and several action not only for what he himself does, but likewise for the acts of those who, with him, violate public as well as private rights."; *South Bend Mfg. Co. v. Liphart*, 39 N.E. 908, 909 (Ind. Ct. App. 1895)

> The case is analogous to that of an injury produced by the collision of two railroad trains under different ownership and management, caused by the concurring negligence of both companies. Each company is jointly and severally liable for the whole injury. . . . The fact that the negligence of some other person concurred in producing the injury will not screen him from liability.

Stone v. Dickinson, 87 Mass. 29, 31-32 (1862)

> It does not in any way change or affect the injury done to the plaintiff . . . that the immediate trespassers, by whom the tortious act was done, were the agents of several different plaintiffs, who, without preconcert, had sued out separate writs against him. . . . He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with a privilege of electing to take his satisfaction *de melioribus damnis*.

McDermott v. Hannibal & St. J. R. Co., 87 Mo. 285, 301 (1885) (act of negligence is not excused by the fact that an unforeseen concurrent event co-operated with it to produce plaintiff's injury: "the defendant is liable

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Finally, state supreme courts followed the same rule in the decades after FELA's enactment. For example, the Virginia Supreme Court rejected a request to apportion the injury to plaintiff's land between a railroad and a lumber company. As that court explained: "The doctrine is thoroughly established that where there are several concurrent negligence causes, the effects of which are not separable, though due to independent authors, either of which is sufficient to produce the entire loss, all are jointly or severally liable for the entire loss."[33]

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for [harm], although other causes concurred at the time to produce the injury"); *Sheridan v. Brooklyn & Hudson River R. Co.*, 36 N.Y. 39, 41 (1867) ("It is no justification for the defendants, that another party, a stranger, was also in the wrong."); *Colegrove v. N. Y. & Hudson River R. Co.*, 20 N.Y. 492, 494 (1859) (passenger injured by a collision resulting from the concurrent negligence of two railroad corporations may maintain a joint action against both); *Bard v. Yohn*, 26 Pa. 482 (1856) (plaintiff, who was kicked by one defendant's horse and thrown against another's carriage, may recover in full against either).

33. *Carolina, Clinchfield & Ohio Ry. Co. v. Hill*, 89 S.E. 902, 903 (Va. 1916). *See also, e.g., McDaniel v. Cherryvale*, 136 P. 899, 899-900 (Kan. 1913) (city and oil company that each discharged pollution into stream were jointly liable, under rule that "if two or more persons by their concurrent wrongdoing cause injury to a third they are jointly and severally liable and the injured party may, at his option, institute an action and recover against one or all of those contributing to the injury"); *Arnold v. Milling Co.*, 119 P. 373, 374 (Kan. 1911) (where flooding was caused both by railroad's embankment and by dam constructed by other parties, "the plaintiff was therefore entitled to sue all for the joint tort"); *Tidal Oil Co. v. Pease*, 5 P.2d 389, 390-91 (Okla. 1931) (imposing joint liability where cattle drank from one or both of two streams poisoned by different defendants); *Cushing v. High*, 175 P. 229, 230 (Okla. 1918)

> There were a few refineries close to the property of the plaintiff below, and it was disclosed that he had sued them to recover damages for the pollution of the stream which flowed through his property. . . . [T]he fact that said stream was polluted from other sources was not any defense or excuse for the city to add thereto, nor would that fact prevent the owner from recovering from the city for any damages caused to him. . . .

Not surprisingly, all of the leading common-law treatises articulated the same principle of joint liability. *See, e.g.*, Francis M. Burdick, A CONCISE TREATISE ON THE CIVIL LIABILITY AT COMMON LAW 213 (1913) ("[I]f either of the wrongdoers committed his tort in circumstances which would fairly apprise a reasonably careful person that it would co-operate with the tort of another, he is answerable for the entire damage."); Thomas M. Cooley, A TREATISE ON THE LAW OF TORTS *144 (2d ed. 1888) ("the party wronged may, at his election, compel any one of the parties chargeable with the act, or any number less than the whole, to compensate him for the injury"); Fowler V. Harper, A TREATISE ON THE LAW OF TORTS § 302, at 676 (1st ed. 1933) ("Joint liability in tort may be imposed . . . where, although there is no joint action, nevertheless the independent acts of several actors concur to produce the harmful consequences."); *id.* at 677 ("[A]ll are jointly and severally liable for the entire damage. Neither can plead that the injury would have happened irrespective of his acts, for by the same argument all could escape liability. Better that all should be liable, and such is the result of the cases.").

Thus, the principle of joint and several liability was well-settled at common law in the decades before and after FELA's enactment. In cases of concurrent, independent action, a plaintiff was not permitted to join multiple defendants in one suit, but he or she could sue one defendant and hold that defendant entirely liable as long as the defendant's act proximately caused the plaintiff's injury. Furthermore, as discussed below in Section C, modern developments provide no basis for incorporating a rule of proportionate several liability in FELA.

B. Unitary Personal Injuries Have Not Been Considered "Divisible" under the Common Law

The rule of joint liability has been particularly important in cases of torts resulting in unitary personal injuries, for such injuries traditionally have been regarded as "indivisible" and not subject to apportionment. This principle is a direct descendant of the famous "exploding squib" case, *Scott v. Shepard*,[34] which established that each tortfeasor is independently and entirely liable for an indivisible injury. As Dean Prosser explained:

> Certain results, by their very nature, are obviously incapable of any practical division. Death is such a result, and so is a broken leg or any single wound, the destruction of a house by fire, or the sinking of a barge. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm. Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each may be charged with all of it. . . . If a defendant is liable at all, he will be liable for all the damage caused.[35]

The Restatement follows the same approach. The Restatement of Torts § 875 and the Restatement (Second) of Torts § 879 both impose joint and several liability on independent tortfeasors who cause an indivisible injury. The Restatement (Second) of Torts, states the same rule as Prosser:

> Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division. Death is that kind of harm, since it is impossible, except upon a purely arbitrary basis for the purpose of accomplishing the result, to say that one man has caused half of it and another the rest. The same is true of a broken leg, or any single wound, or the destruction of a house by fire, or the sinking of a barge. Such harms can be apportioned, if it all, only upon the basis of a prior reduction in value of what has been destroyed.[36]

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34. 95 Eng. Rep. 1124, 1127-1129 (1773).

35. William L. Prosser, HANDBOOK OF THE LAW OF TORTS § 47, at 300, 302 (1st ed. 1941).

36. § 433A, comment i (1965).

Moreover,

> [b]y far the greater number of personal injuries, and of harms to tangible property, are thus normally single and indivisible. Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.[37]

It is well-established that like asbestosis, "mesothelioma is an indivisible injury."[38] This conclusion is well-grounded in common law decisions concerning other types of personal injuries such as broken limbs,[39] the results of medical malpractice,[40] and injuries from auto accidents.[41] Even property damage has often been held to be indivisible and not subject to apportionment.[42]

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37. *Id.*

38. The Restatement (Third) of Torts (Final Tent. Draft 1999), § 28A, illustration 1. *See also, e.g., Borel v. Fibreboard Paper Prods.*, 493 F.2d 1073, 1094-95 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (asbestosis and mesothelioma are indivisible injuries subject to joint and several liability); *Sealover v. Carey Canada*, 791 F. Supp. 1059, 1063 (M.D. Pa. 1992) (asbestosis and mesothelioma are indivisible injuries subject to joint and several liability), *rev'd on other grnds*, 996 F.2d 42 (3d Cir. 1993).

39. *E.g., Capone v. Donovan*, 480 A.2d 1249 (Pa. Super. Ct. 1984).

40. *E.g., Harvey v. Denton*, 601 S.W.2d 121, 124 (Tex. Civ. App. 1980).

41. *E.g., Piner v. Superior Court of Maricopa*, 962 P.2d 909 (Ariz. 1998); *Buehler v. Whalen*, 374 N.E.2d 460, 465 (Ill. 1977).

42. *E.g., Bill C. Harris Constr. Co. v. Powers*, 554 S.W.2d 332, 337 (Ark. 1977) (damage to bulldozer indivisible and "[d]amages for the entire injury may be recovered from all or any one of the joint tortfeasors"); *D&W Jones, Inc. v. Collier*, 372 So.2d 288, 290-94 (Miss. 1979) (pollution of ponds was "single, indivisible injury").

The burden of proving divisibility rests with the defendant, and any difficulties of meeting that burden are resolved in favor of joint liability. In the words of Dean Wigmore,

> [w]herever two or more persons by culpable acts, whether concerted or not, cause a single general harm not obviously assignable in parts to the respective wrongdoers, the injured party may recover from each for the whole. In short, wherever there is any doubt at all as to how much each caused, take the burden of proof off the innocent sufferer; make any one of them pay for the whole, and then let them do their own figuring among themselves as to what is the share of blame for each.[43]

Accordingly, there is ample reason to regard personal injuries as "indivisible" harms subject to joint and several liability.

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43. J.H. Wigmore, *Joint Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress*, 17 Ill. L. Rev. 458, 459 (1923); *see also* 1 Stuart M. Speiser, *et al.*, THE AMERICAN LAW OF TORTS § 3.7, at 398 (1983 and 2002 supp.) ("[T]he burden of proof is on the defendant once the plaintiff has made a prima facie showing that the defendant's conduct contributed as a proximate cause to the harm suffered by plaintiff."). *See Maddux v. Donaldson*, 108 N.W.2d 33, 38 (Mich. 1961) ("Is it better . . . that a plaintiff, injured through no fault of his own, take nothing, rather than that a tort-feasor pay no more than his theoretical share of the damages accruing out of a confused situation which his wrong has helped to create?"); *Azure v. Billings*, 596 P.2d 460, 470-71 (Mont. 1979) ("[W]here the tortious act is established, it is better that the tortfeasor should be subject to paying more than his theoretical share of the damages in a situation where the tortious conduct has contributed to the confused situating making it difficult to prove which tortious act did the harm."); *Phennah v. Whalen*, 621 P.2d 1304, 1307 (Wash. Ct. App. 1980) ("The emerging rule from this line of cases is that when the harm is indivisible as among successive tortfeasors, the defendants must bear the burden of proving allocation of the damages among themselves.").

C. Modern Developments Provide No Basis for Incorporating a Rule of Proportionate Several Liability in FELA.

Although petitioner focuses on the contemporary adoption of comparative fault statutes, such enactments are consistent with joint and several liability. The 1977 Uniform Comparative Fault Act incorporated a modified form of joint and several liability in its proposal of comparative negligence principles.[44] As Dean Wade explained, the comparative fault schemes, as originally adopted, allowed percentage shares of fault to be assigned to each of several defendants, but these schemes did not change the rule that each defendant could be held 100% responsible to the plaintiff.[45] Hence, until recently, numerous states adhered to joint and several liability after the adoption of comparative fault schemes, recognizing that the allocation of comparative fault *among defendants* does not alter a joint tortfeasor's full responsibility for a plaintiff's single, indivisible injury. Thus, "of the thirty-eight . . . states that have adopted comparative negligence . . . twenty-nine have completely retained joint and several liability, five have retained the doctrine in a [limited or] modified form, and only three have done away with it."[46]

Today, the States have chosen a variety of approaches to joint and several liability. According to the Restatement (Third) of Torts, fourteen States and the District of Columbia have retained joint and several liability in its traditional form.[47]

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44. Uniform Comparative Fault Act § 2, 12 U.L.A. 49 (West Supp. 1992).

45. *See* John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 Am. J. Trial Advoc. 193, 194-97 (1986).

46. *Rozevink v. Faris*, 342 N.W.2d 845, 849 (Iowa 1983).

47. *See* Restatement (Third) § 17 at 151. *See also Buchanan v. Collier*, 555 So.2d 134 (Ala. 1989); *Bill C. Harris Constr. Co. v. Powers*, 554 S.W.2d 332 (Ark. 1977); *Clark v. Brooks*, 377 A.2d 36[illegible] (Del. Super. Ct. 1977); *National Health Labs. v. Ahmadi*, 596 A.2d 555 (D.C. 1991);

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Another four States have retained joint and several liability when the plaintiff is free from fault (and sometimes even when the plaintiff is partially at fault).[48]

Although the Restatement identifies 36 States as having chosen to modify joint and several liability, few States have abolished it for all cases, injuries, circumstances, and types of damages, and there are significant variations in the schemes adopted by the States that have chosen to merely modify the doctrine. For example, some States, such as *New Hampshire*, have eliminated joint and several liability only where the defendant's comparative responsibility is below some threshold level, such as 50%.[49] Other States, like *Minnesota*, limit the joint and several liability of defendants according to a formula based on their share of the plaintiff's damages.[50] A number of so-called "reallocation" States, such as *Oregon* and *Connecticut*, impose an insolvent tortfeasor's share of liability on some or all of the other defendants.[51] Significantly, in 16 of the 36 States that have modified joint and several liability, shares of comparative fault cannot be assigned to non-parties.[52] And in

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Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997); Idaho Code § 6-803; Maine Code, Title 14, § 156; *Morgan v. Cohen*, 523 A.2d 1003 (Md. 1987); *Allen v. Chance Mfg. Co.*, 873 F.2d 465 (1st Cir. 1989) (interpreting Mass. law); *Hairston v. Alexander Tank & Equip. Co.*, 311 S.E.2d 559 (N.C. 1984); Pa. Code § 7102; *Roberts-Robertson v. Lombardi*, 598 A.2d 1380 (R.I. 1991); *Rourk v. Slevey*, 164 S.E.2d 909 (S.C. 1968); S.D. Codified Laws § 15-8-15.1; *Dickenson v. Tabb*, 156 S.E.2d 795 (Va. 1967); W. Va. Code § 29-12A-7.

48. *See See* Restatement (Third) § 17 at 151& n.6.

49. *See* N.H. Rev. Stat. § 507:7-e; Wisc. Stat. § 895.045(1).

50. *See* Minn. Stat. § 604.02.

51. *See* Oregon Rev. Stat. § 18.485.(4) (reallocation to any defendant whose responsibility exceeds plaintiff's and 25% threshold); *see also* Conn. Gen Stat. § 52-572h(g).

52. *See* Restatement (Third) of Torts, § 17 at 153, 154, 156, 157, 159 (citing state statutes and decisions).

17 of those same 36 States, employers may not be assigned a percentage of comparative responsibility.[53]

Many States, such as *Alaska*, *Arizona*, *Hawaii*, *Illinois*, *Kentucky*, *Michigan*, *Nevada*, *New Jersey*, *Texas*, and *Washington*, have decided to retain joint and several liability in important categories of cases defined by subject matter, including FELA, asbestos, products liability, and medical malpractice. For example: *Arizona* preserves joint liability for one category of cases — cases involving FELA claims;[54] *Hawaii* retains joint and several liability for both economic and noneconomic damages in cases involving, *inter alia*, "[t]oxic and asbestos-related torts" and "[s]trict and products liability torts";[55] *Illinois* has chosen to keep joint liability

> in any action in which the trier of fact determines that the injury or damage for which recovery is sought was caused by an act involving the discharge into the environment of any pollutant, including any waste, hazardous substance, irritant or contaminant, including, but not limited to smoke, vapor, soot, . . . asbestos, toxic or corrosive chemicals, . . . any defendants found liable shall be jointly and severally liable for such damage[56]

Kentucky retains joint and several liability for medical malpractice claims;[57] *Michigan* maintains joint liability for medical malpractice cases;[58] *New Jersey* has chosen to keep a modified system of joint liability for "civil action[s] seeking damages for personal injuries or death where the cause of the damages is the negligent manufacture, use, disposal, handling, storage or treatment of hazardous or toxic substances";[59]

53. *Id.* at 154, 157, 159.
54. *See* Ariz. Rev. Stat. § 12-2506D(3).
55. *See* Hawaii Rev. Stat. § 663-10.9.
56. *See* Ill. Comp. Stat., Ch. 735, para. 5/2-1118.
57. *See* Ky. Rev. Stat. § 304.40-290.
58. *See* Mich. Comp. Laws § 600.6304(6)(a).
59. *See* N.J. Stat. § 2A:15-5.3.

and *Texas* retains joint and several liability where "the claimant's personal injury, property damage, death, or other harm resulted from a toxic tort" and defendant's share of responsibility is at least fifteen percent).[60] Still other States, such as *California* and *Iowa*, have eliminated joint and several liability for noneconomic damages in negligence cases, but have retained it for economic damages.[61] Finally, *New Mexico* has elected to retain joint liability in cases where "sound . . . public policy" supports it.[62]

From this canvas, one point emerges with great clarity: there is substantial variety even among States that have chosen to modify the traditional rule of joint and several liability. The issue of joint and several liability is a heavily policy-laden matter on which the States should remain free to adopt different approaches. In doing so, the States are performing their time-honored function as the "laboratories" of democracy.[63]

This Court would not be justified in announcing a "national consensus" against joint and several liability. This is especially so inasmuch as the Restatement (Third) of Torts: Apportionment of Liability has expressly stated that it "takes no position on whether joint and several liability, several liability, or some combination of the two should be adopted for independent

60. *See* Tex. Civ. Prac. & Rem. Code § 33.013(c) *See also* Alaska Stat. § 46.03.822; Nev. Rev. Stat. §. 41.141(5)(c); Wash. Rev. Code § 4.22.070 (interpreted in *Sophie v. Fibreboard Corp.*, 771 P.2d 711, 727-28 (Wash. 1989)).

61. *See* Cal. Civ. Code § 1431.2 (adopted by Proposition 51, ballot initiative in 1986; *see also id.* § 1431.2 (presumption of joint liability, dating from 1872, for matters not covered by Section 1431.2) Iowa Code § 668.4.

62. *See* N.M. Stat. § 41-3A-1C(1)-(4); *see also Enriquez v. Cochran*, 967 P.2d 1136 (N.M. Ct. App. 1997) (felling large dead trees is an inherently dangerous activity, giving rise to joint and several liability under "public policy" exception); *accord Saiz* v. *Belen Sch. Dist.*, 827 P.2d 102 (N.M. 1992).

63. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

tortfeasors who cause an indivisible injury," and that the issue of what approach to take should be left to the laws of the respective States, inasmuch as "*there is currently no majority rule on this question. . . .*"[64]

Thus, the Restatement (Third) does not suggest that undecided courts or States should adopt a mythical "consensus" view but rather offers the courts and States "five different versions of joint and several, several, and combinations of the two. . . ."[65] Even the agnostic approach taken by the Restatement (Third) has been controversial. Some experts have criticized the Restatement for failing to give greater prominence to joint and several liability and for exaggerating the extent to which States have departed from the basic common-law rule. One leading torts scholar flatly maintains that "the application of joint and several liability for indivisible injury is the dominant rule."[66]

A recent proposal by the NCCUSL also recognizes the divergent approaches taken by the States regarding joint and several liability.[67] Significantly, that proposal is far more

64. Section 17, Comment a (emphasis added).

65. *Id.*

66. Frank J. Vandall, *A Critique of the Restatement (Third), Apportionment as it Affects Joint and Several Liability*, 49 EMORY L.J. 565, 619 (2000); *see also id.* at 570

> The Reporters' radical approach allows them to criticize joint and several liability without acknowledging the common law or the underlying policies. Unfortunately, it also allows the ALI to grant its imprimatur to a work that is not a new Restatement. It is instead a critique of joint and several liability without engagement, without the labor of a new Restatement. . . . [T]the Restatement (Third), Apportionment is biased tort reform, designed to benefit two specific clients: the defense bar and the insurance industry.

67. National Conference of Commissioners on Uniform State Laws, Prefatory Note, Uniform Apportionment of Tort Responsibility Act (2002 draft).

nuanced than the "one-size-fits-all" rule of proportionate several liability advanced by petitioner in this case.

Accordingly, this Court would not be justified in enshrining a uniform, national standard of proportionate several liability in FELA. Such a step would amount essentially to judicial legislation — to rewriting FELA from the bench. This Court has recognized that "it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down."[68] This Court should "not cavalierly 'imped[e] the States' ability to serve as laboratories for testing solutions to novel legal problems.' "[69]

In *amici's* view, States should have the freedom to recognize the virtues of joint and several liability if they choose to do so. For example, joint and several liability allocates the risk that one or more of the responsible tortfeasors might be insolvent on the remaining solvent tortfeasors rather than imposing this risk on the plaintiff. In addition, the burden of identifying and suing other persons who may be jointly and severally liable is borne by the defendants rather than the plaintiff.

By contrast, under petitioner's view, a culpable defendant should be free to reduce its liability by shifting blame to immune, bankrupt, or absent parties who have no incentive to challenge the defendant's assertion that they are responsible for the plaintiff's injury. Moreover, it is unclear whether petitioner's proposed proportionate several liability would apply when supposedly liable non-parties cannot be joined to the action, cross-examined, or even located. As the Montana Supreme Court recently commented in holding that a statute eliminating joint liability for defendants who were deemed to be less than 50% at fault for a plaintiff's injuries violated the Montana constitution's due process clause, such an elimination of joint liability "arbitrarily prejudices plaintiffs by requiring them to

68. *Smith v. Robbins*, 528 U.S. 259, 275 (2000).

69. *Id.* (citation omitted).

exonerate nonparties."[70] Hence, "there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties," particularly when the allocation of fault to nonparties is performed "without any procedural safeguard" ensuring that plaintiffs receive a fair adjudication of their claims.[71]

States adhering to joint and several liability draw support from principles of just responsibility. By definition, a defendant is subject to joint and several liability for the entirety of the plaintiff's damages only if the defendant's tortious conduct was an actual and proximate cause of the entire injury. Thus, joint and several liability applies only to injuries for which each defendant is fully responsible. Indeed, under the rules of causation set forth by the Restatement (Second) of Torts, "any one of a number of persons whose tortious conduct is a substantial factor in causing harm is liable for the harm in the absence of a superseding cause."[72] The defendant is not liable for injuries to which he did not contribute. Nor is he liable if, for reasons of policy or principle, his connection to the injury is considered too remote or minimal to be "proximate."[73]

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70. *Newville v. State of Montana Dept. of Family Services*, 883 P.2d 793, 802 (Mont. 1994).

71. *Id. See also Plumb v. Fourth Judicial District Ct.*, 927 P.2d 1011, 1019-20 (Mont. 1996) (invalidating as unconstitutional nonparty defense created by 1995 amendments on the ground that it was unfair to apportion liability to parties who were not named in the lawsuit and who did not have an opportunity to appear and defend themselves); *see also State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) (striking down legislation that, inter alia, modified joint and several liability as an invasion of judicial power over court procedure).

72. Restatement (Second) of Torts § 875, Comment c, at 315 (1979).

73. *See* 3 Fowler V. Harper, *et al.*, THE LAW OF TORTS § 10.1, at 3-7, 11, 17-18 (2d ed. 1986); W. Page Keeton, *et al.*, PROSSER & KEETON ON THE LAW OF TORTS § 47, at 328-29, § 52, at 345-49 (5th ed. 1984).

The numerous States that have chosen to retain joint and several liability recognize that there are sound policy reasons to do so. As the Illinois Supreme Court recently explained,

> [a] defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior is not diminished if some other person's tortious behavior also was an actual and proximate cause of the injury. Rather each defendant whose tortious behavior was an actual and proximate cause of the injury is individually fully responsible for the entire injury.[74]

Here, the Petitioner argues that it is somehow unfair or unreasonable to hold a "50% negligent defendant" liable for "100% of the injury." But in a circumstance where there are two defendants, each of whose negligence is an actual and proximate cause of the plaintiff's entire injury, States may reasonably conclude that there is a logical basis for holding each liable for the sum total of the damages. If one imagines a situation in which there are ten tortfeasors rather than two, and each is an actual and proximate cause of the plaintiff's entire injury, there is no apparent reason why their individual full responsibility should be reduced to only one-tenth of the injury merely because other tortfeasors are also at fault. As Professor Richard W. Wright, one of the five academic advisers to the Restatement (Third) of Torts, has observed, "a defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior does not become 'partial' or 'minimal' simply because other defendants' tortious behavior was much worse, individually or in the aggregate."[75]

Hence, petitioner's criticism of joint and several liability reflects a fundamental confusion between each defendant's *individual full responsibility to the plaintiff* for the damages

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74. *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1086-87 (Ill. 1997) (citation and internal quotation marks omitted).

75. Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45, 59 (1992).

that the defendant tortiously caused and the *comparative responsibility percentages among the defendants*. As the Illinois Supreme Court further explained,

> The feasibility of apportioning fault on a comparative basis does not render an indivisible injury "divisible" for purposes of the joint and several liability rule. A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage. . . . The mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.[76]

As one commentator has opined, saying that a defendant is "50% negligent" is like "saying that someone is '50% pregnant.' "[77] "Rather, each defendant was 100% negligent, each defendant's negligence was an actual and proximate cause of 100% of the injury, and each defendant therefore is fully responsible for the entire injury. Only when we *compare* their individual full responsibilities, and assume that they were equally negligent, does it make sense to say that each defendant, *when compared to the other*, bears 50% of the total *comparative* responsibility for the injury."[78]

To be sure, the defendant who initially pays the plaintiff 100% of damages may well have a contribution, indemnity, restitutionary, or unjust enrichment claim against the other tortfeasors based on their *comparative* responsibility for the injury. But if the defendant cannot pursue that claim because the other tortfeasors are absent, insolvent, or otherwise judgment-proof, this does not mean that the defendant is being held liable for more than he tortiously caused or for more than

76. *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1086 (Ill. 1997) (citation and internal quotation marks omitted).

77. Wright, *Joint and Several Liability*, 23 MEM. ST. U. L. REV. at 56.

78. *Id.* (emphasis in original).

he is responsible. "Whether or not she can obtain contribution, she is individually fully liable to the plaintiff for all the damages that were the actual and proximate result of her tortious behavior."[79] Any unfairness is an issue *among defendants*, not between *plaintiff and defendant*.

Law and economics scholars also recognize important arguments in favor of joint and several liability. For example, Profs. Lewis Kornhauser and Richard Revesz have concluded that negligence rules are efficient under joint and several liability as long as the standard of care for each of the actors is set at the socially optimal level but that negligence rules are not efficient in the absence of joint and several liability.[80] Similarly, Profs. Theodore Eisenberg, Henry Mark, and Stuart Schwab have determined that joint and several liability is more efficient than several liability in inducing optimal social behavior.

> The basic law and economics model suggests that joint and several liability is more efficient than several-only liability. By ensuring that each actor faces the full social costs of its actions, joint and several liability induces optimal behavior. The [economic] models reach less determinate outcomes when insolvency . . . and settlements are considered. But no model shows that several liability is generally more efficient. The [economic] models suggest then, that one should skeptically view empirical claims that several liability is more efficient than joint liability.[81]

In fact, the Restatement (Third) of Torts, citing Professor William Landes and Judge Richard Posner, notes that "recent scholarship has concluded that under certain circumstances joint

79. *Id.* at 61-62.

80. Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831, 834 (1989).

81. Quoted in Frank J. Vandall, *A Critique of the Restatement (Third), Apportionment as It Affects Joint and Several Liability*, 49 EMORY L.J. 565, 574-75 (2000).

and several liability better serves the goal of economic efficiency than does a rule that imposes only several liability."[82]

Petitioner's suggestion that there is a "consensus" regarding proportionate several liability is illusory. There is no reason for this Court to conclude that proportionate several liability is preferable to the traditional common-law rule, and no basis for this Court to enshrine several liability in the FELA.

CONCLUSION

The judgment below should be affirmed.

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82. Restatement (Third) of Torts § 18A, citing W..M. Landes & R.A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEG. STUD. 617 (1980).

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